

P. THE COMMISSION CANNOT IMPOSE INDEPENDENT PROCUREMENT OBLIGATIONS ON BOCs NOT ENGAGED IN MANUFACTURING.

The Commission seeks comment on whether Section 273(e), which deals with equipment procurement and sales, applies to all BOCs or only to BOCs that are authorized to manufacture under Section 273(a). Section 273 is sub-titled “Manufacturing by Bell Operating Companies.” All of the other subparts of Section 273 are related to BOCs’ engagement in manufacturing. Section 273(e) should be interpreted as only applying to BOCs that are authorized to manufacture under Section 273(a).

The only reason Congress imposed Section 273(e) procurement obligations upon the BOCs was to remove their perceived incentive to cross-subsidize the prices of, or otherwise to discriminate in favor of, affiliate-manufactured equipment with revenues from regulated services. Under this theory, a BOC could purchase affiliate-manufactured equipment even if it was more expensive and not of the highest quality.

Perhaps more importantly, the Commission clearly missed the mark when it states the objective of this section in terms of favoring any manufacturer with which the BOC has a “relationship.”³⁶ The objective is not to police the relationships of BOCs with any manufacturer, but to regulate the relationships with affiliated manufacturers. The Commission must not take this section out of its historical context and impose independent procurement obligations on BOCs not otherwise engaged in manufacturing.

³⁶NPRM at ¶ 60.

**Q. THE COMMISSION SHOULD NOT EXPAND THE ORDINARY MEANING OF
TERMS CONTAINED IN THE ACT.**

1. DEFINITION OF “CONSIDER.”

Section 273(e)(1)(A) requires BOCs, for the duration of the separate manufacturing subsidiary requirement, to “consider” in procuring or awarding supply contracts for telecommunications equipment supplied or produced by unrelated persons. The Commission seeks comment on whether the term “consider” should be specially defined or should be given its ordinary meaning, (i.e., “to think seriously about” or “to bear in mind”).

The purpose of Section 273(e)(1)(A) is to preclude BOCs from using only related entities to fulfill their needs for telecommunications equipment. Giving the word “consider” its ordinary meaning accurately reflects that purpose and reflects current procurement practices in almost all businesses. Traditionally, it has been the practice of business to issue requests for proposals (“RFPs”) to several qualified companies in a particular field before selecting a supplier. However, the RFP process is not sacrosanct. Some businesses impose a requirement upon themselves to make quantifiable purchases from a specified segment of the market place (*e.g.*, minority businesses). When a business has knowledge of the capabilities of the majority of suppliers of a particular piece of equipment, it may select its supplier without using the RFP process. An inherent part of these good business practices is “thinking seriously” about more than one supplier.

2. DEFINITION OF “DISCRIMINATION.”

Section 273(e)(1)(B) prohibits BOCs from discriminating in favor of equipment produced by an affiliate or related person in procuring or awarding supply contracts for telecommunications equipment. Section 272(c)(1) prohibits a BOC from discriminating between

its affiliate and any other entity in the procurement and provision of goods, services, facilities and information or in the establishment of standards. The Commission seeks comment on whether the word “discriminate” has any different import in the context of Section 273(e)(1)(B) than it does in Section 272(c). From a business perspective, BOCs should be interested in acquiring equipment that provides the best technical solution for the best overall value. BOCs would limit their own ability to respond to customer demand if they restricted themselves to technology only developed or provided by a manufacturing affiliate. In the context of this section, the word discriminate should be interpreted to mean that a BOC must treat similarly situated entities in a reasonably similar manner.

The Commission also seeks comment on what affirmative steps, if any, a BOC would need to take to ensure that it does not discriminate in violation of Section 273(e)(1)(B). Section 273(e)(2) requires BOCs to make “procurement decisions and to award all supply contracts for equipment, services, and software on the basis of an objective assessment of price, quality, delivery, and other commercial factors.” As long as BOC purchasing decisions are based on an objective assessment of these factors, it cannot be found to have discriminated in violation of Section 273(e)(1)(B). The Commission should not require the BOCs to make such factors available for evaluation as to whether a particular selection process was discriminatory, unless a complaint arises or the Commission has a reason to investigate or audit.

3. DEFINITION OF “RELATED PERSON.”

The Commission seeks comment as to the specific types of relationships that would make an entity a “related person” for the purposes of Section 273(e). In this context, the term “related person” should be determined to refer to an officer or principal of a manufacturing

affiliate or the manufacturing subsidiary itself or of an entity affiliated with the BOC. An “unrelated person,” therefore, is one who is not associated or affiliated with the BOC. Royalty arrangements and joint ventures with a non-affiliated manufacturer, in which the BOC has a clearly defined business relationship, should not constitute a “related” person. In most cases, the royalty or joint venture relationship will be the result of an analysis and search of the qualified firms in the area of business the agreement is designed to address. Thus, a non-discriminatory procurement process will already have occurred. An exception would be the rare instances when the BOC is only able to identify a single provider who can meet its business need. Then, it would be an administrative burden to have to conduct a full blown procurement search to meet subsequent business needs just because of the existing royalty arrangement.³⁷

4. DEFINITION OF “EQUIPMENT.”

The Commission seeks comment on whether the scope of the term “equipment” in Section 273(e)(2) should be limited to telecommunications equipment and CPE. In this context, the term “equipment” should include telecommunications equipment and CPE. The purpose of Section 273(e) is to prevent discrimination in favor of a BOC manufacturing affiliate. Contracts for other equipment, such as furniture or copiers, would have no bearing on that goal.

5. DEFINITION OF “SERVICES.”

The Commission seeks comment on what types of “services” the mandate in Section 273(e)(2) encompasses. The term “services” should mean services associated with

³⁷For example, suppose a BOC has a development agreement with a non-affiliated supplier which includes a royalty arrangement for equipment or software development required to provide new products and service offerings. It is not reasonable to require that the BOC conduct a more rigorous procurement process than that already specified in the 1996 Act just because the BOC has a different arrangement with those firms for another product.

telecommunication equipment or CPE, such as engineering, installation, training, and maintenance services. The purpose of Section 273(e) is to prevent discrimination in favor of a BOC manufacturing affiliate. Contracts for services not related to telecommunications equipment or CPE would have no bearing on that goal.

R. ANY RESTRICTIONS PLACED ON THE PROCUREMENT OF SOFTWARE SHOULD BE LIMITED TO SOFTWARE PERTAINING TO TELECOMMUNICATIONS AND CPE.

The Commission seeks comment on whether the requirements of Section 273(e) apply to the procurement of all software or only the software “essential to [the] design and development of telecommunication equipment or CPE.” Section 273(e) is intended to ensure that the protections put in place under the MFJ will not be lost if a BOC is affiliated with a manufacturing affiliate. Restrictions on the procurement of software, therefore, should be restricted to the area of telecommunications and CPE.³⁸ It is unreasonable to suggest, for example, that the BOCs would have the ability to affect the market for mainframe or personal computer software.

S. IN CARRYING OUT SECTION 273 OF THE 1996 ACT, THE COMMISSION SHOULD NOT SUBJECT BOCS TO GREATER ADMINISTRATIVE BURDENS THAN THEIR COMPETITORS.

The Commission seeks comment on whether it needs to develop additional enforcement mechanisms, such as mandatory auditing or reporting requirements, for use in enforcing Sections 273(e)(1) and 273(e)(2). It should not. The placement of administrative

³⁸~~See~~ Comments filed by the Telecommunications Industry Association, CC Docket 96-149, August 15, 1996, (“[U]nder the AT&T Consent Decree, as construed by the courts, the BOCs have been permitted to engage in the development of software that is not ‘integral’ to telecommunications equipment or CPE.”).

burdens upon BOCs beyond those that other telecommunications competitors experience regarding their procurement of goods and services is unreasonable. Good business judgment requires that purchase decisions be based on sound business principles. Good business practice, in today's business environment, requires that records are kept of the purchase decision process. No suggestion has been made that the existing complaint procedures are inadequate. Mandatory audits and reporting would only increase administrative cost and burden. Sufficient historical data is available to demonstrate that procurement processes are designed to examine the market for the best available alternatives.

Further, Section 273(e)(4) prohibits a BOC manufacturer or a BOC manufacturing affiliate from restricting sales to any local exchange carrier of telecommunication equipment, including software integral to the operation of such equipment and related upgrades. The Commission seeks comment on whether it should collect information on procurement practices to enable it to detect anomalous behavior that might trigger an audit or an investigation. Sales records of a BOC manufacturer or a BOC manufacturing affiliate might provide insight into the sales restrictions imposed by a BOC manufacturer or a BOC manufacturing affiliate; however, the procurement records of such entities would not contain information which have a bearing on any restriction imposed on a sales. Because a BOC's procurement records would not be particularly helpful in ascertaining whether its manufacturing affiliate has operative sales restrictions, the Commission should not collect procurement records for that purpose. The contract between a BOC and its manufacturing affiliate might reveal the quantity, if any, the BOC is required to purchase. BOC purchase orders and other documents would reveal the quantity actually purchased. However, those records would not have a bearing on the manufacturing affiliates


sales restrictions unless the BOC contracts to purchase all of its affiliate's output. That type of information could be gleaned from the manufacturing affiliate's sales records.

III. CONCLUSION

Congress's goals, and the goals stated by this Commission, include the promotion of competition. Where this Commission has the power to influence positively the beneficial by-products of competition, including increased innovation and the development of new and advanced products, the Commission should do so in keeping with the letter and the spirit of the 1996 Act. The Commission should develop in this proceeding the minimum rules necessary under the terms of the 1996 Act and spur competition in manufacturing and related activities through the efficient entry of BOCs and their affiliates.

Respectfully submitted,

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ANSI's patent policy

1.2.11 Inclusion of patents in American National Standards

There is no objection in principle to drafting a proposed American National Standard in terms that include the use of a patented item, if it is considered that technical reasons justify this approach.

If the Institute receives a notice that a proposed American National Standard may require the use of a patented invention, the procedures in clause 1.2 through 1.5 shall be followed.

1.2.11.1 Statement from patent holder

Prior to approval of such a proposed American National Standard, the Institute shall receive from the patent holder (in a form approved by the Institute) either: assurance in the form of a general disclaimer to the effect that the patentee does not hold and does not anticipate holding any invention that its use would be required for compliance with the proposed American National Standard or assurance that:

- a) A license will be made available without compensation to applicants desiring to utilize the license for the purpose of implementing the standard; or
- b) A license will be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

The terms and conditions of any license shall be submitted to ANSI for review by its counsel, together with a statement of the number of independent licensees, if any, which have accepted or indicated their acceptance of terms and conditions of the license.

1.2.11.2 Record of statement

A record of the patent holder's statement (and a statement of the basis for considering such terms and conditions free of any unfair discrimination) shall be placed and retained in the files of the Institute.

1.2.11.3 Notice

When the Institute receives from a patent holder the assurance set forth in 1.2(a) or 1.2(b), the standard shall include a note as follows:

NOTE—The user's attention is called to the possibility that compliance with this standard may require use of an invention covered by patent rights.

By publication of this standard, no position is taken with respect to the validity of this claim or of any patent rights in connection therewith. The patent holder has, however, filed a statement of willingness to grant a license under these rights on reasonable and nondiscriminatory terms and conditions to applicants desiring to obtain such a license. Details may be obtained from the publisher.

1.2.11.4 Responsibility for identifying patents

The Institute shall not be responsible for identifying all patents for which a license may be required by an American National Standard or for conducting inquiries into the legal validity or scope of those patents that are brought to its attention.